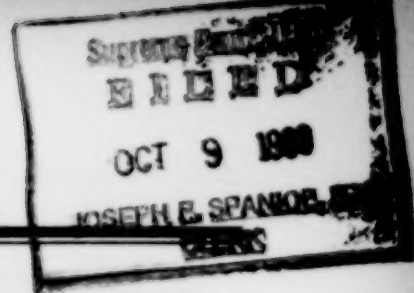


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90-655

No. _____



IN THE
Supreme Court of the United States

OCTOBER TERM, 1990

FREEPORT-MCMORAN INC., *et al.*,
Petitioners,

v.

K N ENERGY, INC.,
Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

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October, 1990

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QUESTIONS PRESENTED

1. Did *Carden v. Arkoma Associates*, — U.S. —, 110 S.Ct. 1015 (1990), abrogate the long-standing rule that the existence of diversity jurisdiction is determined at the time the action is commenced and cannot be ousted by subsequent events?

2. If *Carden* did silently overrule the precept that diversity jurisdiction is not destroyed by events subsequent to the commencement of the action, does the joinder of a nonessential, nondiverse party now constitute an event mandating dismissal of the action?

3. If so, does *Newman-Green, Inc. v. Alfonzo-Larrain*, — U.S. —, 109 S.Ct. 2218 (1989) require that an opportunity be afforded to cure the perceived defect by dismissal of the nondiverse party?

STATEMENT PURSUANT TO RULES 14(b) AND 29.1

Two of the parties to the proceeding in the court of appeals no longer exist. On March 30, 1990 Freeport-McMoRan Operating Company merged into its affiliate, Freeport-McMoRan Oil & Gas Company. On April 2, 1990, McMoRan Oil & Gas Company merged into its parent, Freeport-McMoRan Inc. All other parties appear in the caption of the case.*

* Freeport-McMoran Inc. has no parent company. Its non-wholly owned subsidiaries are petitioner Freeport-McMoRan Oil & Gas Company, Notel, Inc., St. Laurens Harbor Storage Company, Advanced Fertilizers, Inc., American Sulphur Export Corp., Barton-Creek Properties, Inc., C.C. Dill Co., Inc., Freeport Indonesia, Inc., Freeport-McMoRan Cooper Co., Inc., and Freeport McMoRan Insurance Co., Ltd.

The only parties to the proceedings in the court of appeals not appearing on the cover of the petition are Freeport-McMoRan Operating Company and McMoRan Oil and Gas Company. As noted in the text, neither entity any longer exists.

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Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

INTRODUCTION

Petitioners, Freeport-McMoRan Inc. and Freeport-McMoRan Oil & Gas Company, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit dismissing this action for want of subject matter jurisdiction.

OPINIONS BELOW

The opinion of the court of appeals is reported at 907 F.2d 1022. The final judgment entered by the district court is unpublished. Both are reproduced in the appendix ("app.") at pp. 1a and 13a. The orders of the court of appeals denying rehearing and denying petitioner's motion to dismiss a nonessential party, but staying issuance of that court's mandate pending the filing of a petition for a writ of certiorari in this Court, are reproduced at app. pp. 9a and 11a.

JURISDICTION

The judgment of the court of appeals was entered on July 10, 1990, app. p. 1a. A timely petition for rehearing was denied on August 30, 1990, app. p. 9a. Jurisdiction exists under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULES INVOLVED

Article III, sec. 2, cl. 1, of the Constitution provides in pertinent part:

"The judicial Power shall extend to . . . controversies . . . between Citizens of different States."

28 U.S.C. § 1332(a) provides in pertinent part:

The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum of \$50,000, exclusive of interest and costs, and is between citizens of different states

28 U.S.C. § 1653 provides:

Defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts.

Rule 20, F.R.Civ.P., provides in pertinent part:

All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action. . . . A plaintiff . . . need not be interested in obtaining . . . all the relief demanded.

Rule 21, F.R.Civ.P., provides in pertinent part:

Misjoinder of parties is not grounds for dismissal of an action. Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just.

Rule 25(c), F.R.Civ.P. provides:

"In case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party."

STATEMENT

McMoRan Oil & Gas Company ("McMoRan") and its parent company, Freeport-McMoRan Inc. ("Freeport"), brought suit against K N Energy, Inc. ("K N") in the United States District Court for the District of Colorado in 1985. At the time the action was filed, McMoRan was the seller under a long-term natural gas purchase contract. McMoRan sought declaratory relief to determine the proper price to be paid under the contract for gas sold pursuant to it and damages for past underpayments. Freeport asserted separate claims in its own right. Subject matter jurisdiction was grounded upon diversity of citizenship.

Freeport is and McMoRan, prior to its merger into Freeport was, a Delaware corporation with its principal place of business in New Orleans, Louisiana. K N is a Kansas corporation with its principal place of business in Denver, Colorado. Petitioners asserted, and K N agreed, that complete diversity therefore existed.

In the years since petitioners' action against K N was filed, changing business conditions in the oil and gas industry required Freeport to conduct reorganizations of its affiliated entities' assets and structure. As part of one aspect of such a reorganization, McMoRan transferred its interest in the contract at issue in the litigation to an affiliate, FMP Operating Company ("FMPO"). FMPO was a Texas limited partnership operated by McMoRan whose limited partners included citizens of virtually every state, including Kansas and Colorado.

In March, 1990, FMPO merged into another affiliate, Freeport-McMoRan Oil & Gas Company ("FMOG"). Pursuant to the merger, FMOG acquired all the relevant interests of FMPO. FMOG, a Delaware corporation with its principal place of business in New Orleans, is diverse to K N.

Each of the transfers and mergers described above was undertaken for business reasons wholly independent from and unrelated to petitioners' action against K N, and no aspect of this restructuring had any impact upon the conduct of that litigation. The only incidental effect which the restructuring may be said to have had was that petitioners' amended their complaint in 1987 to add FMPO as a party. K N raised no objection to the addition of FMPO, and the district court entered an order adding FMPO as a plaintiff as what was thought to be a matter of routine.

Thus, all of petitioners' claims in this litigation were held at the time of the commencement of the action by McMoRan and Freeport, entities diverse to K N and all remaining claims¹ are now held by FMOG, an entity diverse to K N. For an intermediate period, the claims were held by FMPO, an entity which was not diversified to K N.

Petitioners' case against K N was tried by the district court in November, 1988, and resulted in entry of judgment in favor of McMoRan and FMPO. K N appealed.

On July 10, 1990, the court of appeals reversed the judgment of the district court and directed the entire action dismissed for want of subject matter jurisdiction. The court held that, "although complete diversity was present when the complaint was filed," the addition of FMPO as a plaintiff destroyed jurisdiction. App. p. 5a. The court believed this result was compelled by *Carden v. Arkoma Associates, Inc.*, — U.S. —, 110 S.Ct.

¹ Certain of petitioners' claims were settled.

1015 (1990), stating that "*Carden* establishes that [FMPO's] addition as the real party in interest destroyed the district court's diversity jurisdiction." App. p. 7a.

This result was announced *sua sponte*, without briefing or argument.

Petitioners sought two forms of reconsideration. First, petitioners requested the court to grant rehearing on the question whether *Carden* overruled, *sub silentio*, the long-established rule that diversity jurisdiction is determined at the time the complaint is filed and cannot be ousted by subsequent events. In particular, petitioners noted that diversity jurisdiction had never been thought to be impaired by adding to an existing case a nonessential party, regardless of whether that party was diverse to its adversary.

Second, petitioners filed a motion to drop FMPO as a party. In affidavits and a brief accompanying this motion, petitioners called to the attention of the court the fact that FMPO no longer existed, and that its successor, FMOG, *was* diverse to K N.

The court of appeals denied without comment both the petition for rehearing and the motion to drop FMPO. The court did, however, stay its mandate pending disposition of a timely petition for writ of certiorari.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH THE SETTLED RULE OF THIS COURT THAT DIVERSITY JURISDICTION IS DETERMINED AT THE TIME THE COMPLAINT IS FILED AND IS NOT OUSTED BY SUBSEQUENT EVENTS

Until the decision below, no jurisdictional rule had been more firmly settled than the precept that if diversity jurisdiction existed at the time an action was commenced, it could not, in Justice Story's words, "be divested by any subsequent events." *Clarke v. Mathewson*, 12 Pet. 164, 171 (1838). "Much less," Chief Justice Taft added a century later, "is such jurisdiction defeated by the intervention, by leave of the court, of a party whose presence is not essential to a decision of the controversy between the original parties." *Wichita Railroad & Light Company v. Public Utilities Commission*, 260 U.S. 48, 54 (1922).

This rule, first announced by Chief Justice Marshall in *Morgan's Heirs v. Morgan*, 2 Wheat. 290 (1817), and *Molland v. Torrance*, 9 Wheat. 537 (1824), has never since been questioned in this Court.

The opinion below, however, squarely holds if the party added after the litigation has commenced is not diverse to its adversary "*Carden* establishes that [its] addition as the real party in interest destroys the district court's diversity jurisdiction." App. p. 7a. This is so, even though "complete diversity was present when the complaint was filed." *Id.* p. 5a. This clear holding flatly contradicts the equally clear holding of *Wichita Railroad* and a host of other decisions of the Court. *E.g.*, *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283, 295 n. 27 (1938) ("Change of parties by substitution or intervention does not oust the jurisdiction"); *Hardenbergh v. Ray*, 151 U.S. 112, 116 (1894) ("When the original suit was brought . . . the court acquired jurisdiction of the controversy, and no subsequent change of the parties could affect that jurisdiction").

The court of appeals believed *Carden* compelled the result it reached observing that, but for *Carden*, "[t]his case might well have continued on its journey in federal court" (App. p. 2a).

But nothing in *Carden* suggests that adding a non-diverse party to existing litigation destroys diversity jurisdiction. *Carden* simply reaffirmed the traditional understanding that when the *original* plaintiff is a partnership a federal court is to look to the citizenship of both limited and general partners in determining whether complete diversity existed at the time the complaint was filed.² It said nothing about the entirely different issue whether a nondiverse, nonessential party could be added to existing litigation without destroying diversity jurisdiction.

Nor is there the slightest indication anywhere in *Carden* that the Court intended silently to overrule a principle of federal jurisdiction announced in 1817 and adhered to without question since. Indeed, only a few months before *Carden* was announced, the author of the *Carden* opinion had written for the Court that "the distinction between new parties and parties already before the court" is "central" in determining whether federal jurisdiction exists. *Finley v. United States*, — U.S. —, 109 S.Ct. 2003, 2006 n.2 (1989).³ Still less is there any indication *Carden* intended to abrogate so important a tenet of federal jurisdiction without suggesting what rule was to replace it.⁴

² The *Carden* Court opened its opinion by stating the question to be decided: "[W]hether, in a suit brought by a limited partnership of the limited partners must be taken into account to determine diversity of citizenship among the parties." 110 S.Ct. at 1016.

³ If *Carden* had the effect attributed to it by the opinion below, it plainly overruled both *Wichita Railroad* and *Hardenbergh v. Ray*. It also called the "central distinction" of *Finley*, into serious doubt.

⁴ By sharp contrast, when the Court overruled the much-criticized *Enelow-Ettelson* doctrine, it did so explicitly and with careful atten-

If *Carden* did indeed silently work the far-reaching alteration in jurisdictional doctrine which the opinion below attributes to it, the Court should use this opportunity to explore which of its precedents in this area are still binding authority and which are now to be deemed abandoned.

If *Carden* was not intended to abrogate the rule that diversity jurisdiction is determined at the time the complaint is filed, the contrary holding below should be corrected before it sows confusion, and breeds unnecessary litigation, in every diversity case in which an additional plaintiff or defendant is joined after the action has commenced.

II. THE DECISION BELOW RAISES SIGNIFICANT PROBLEMS FOR THE EFFICIENT ADMINISTRATION OF THE BUSINESS OF THE FEDERAL JUDICIARY

The extent of confusion, controversy and needless litigation which the opinion below will generate can hardly be overstated. For almost two centuries this Court has announced, and the lower courts have applied, the clear and straightforward rule that if diversity jurisdiction exists at the time of the filing of the complaint, it exists at the time of the filing of the complaint, it exists throughout the case.⁵

The opinion below holds that *Carden* abolished this "uniform . . . easy to apply test" (13B C. Wright, A. Mil-

tion to the jurisdictional precepts which would thereafter apply. *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 282-83 (1988).

⁵ If the original complaint is amended to state a new cause of action which can be brought *only* by someone other than the original plaintiff—as when the original plaintiff has died, his action does not survive him and his personal representative asserts a different action—the question of jurisdiction is determined at that time. *Dunn v. Clarke*, 8 Pet. 1 (1834). This narrow, clearly understood exception was not mentioned by the court of appeals and is inapplicable here.

ler & E. Cooper, *Federal Practice and Procedure*, § 3602, p. 452) and replaced it with a rule stating that the addition of a nondiverse party destroys subject matter jurisdiction.⁶ The deleterious impact this holding will have upon the sound administration of federal justice is apparent.

It subjects diversity jurisdiction to unrelenting uncertainty in the class of cases for which the constitutional grant of power to create the jurisdiction was most immediately intended: complex commercial litigation having a substantial interstate impact. 1 J. Moore, et al., *Moore's Federal Practice*, ¶ 0.71[3.2] (1990 rev.).⁷ Such a rule will force many existing, and all potential, litigants within the Tenth Circuit to choose between the statutory right to a federal court sitting in diversity and the need to sell or transfer assets to a nondiverse entity.

This result will, in turn, nullify, in a large class of cases, the beneficial effects of the liberal joinder and substitution provisions of Rules 20, 21 and 25 which have long been thought to be among the most salutary reforms contained in the Federal Rules. The holding below that *Carden* mandates such results should be corrected before its unfortunate consequences are fastened upon district courts and litigants in the Tenth Circuit and elsewhere.

⁶ The opinion below adds that substitution of a party under Rule 25 does *not* affect subject matter jurisdiction. App. p. 6a. No reason was suggested for this bizarre dichotomy, and none comes readily to mind. Cf., *Landress v. Phoenix Mutual Ins. Co.*, 291 U.S. 491, 499 (1934) ("The attempted distinction . . . will plunge this branch of the law into a Serbonian Bog").

⁷ It is ironic that the *Gulfstream* Court overruled the *Enelow-Ettelson* doctrine precisely because it *created* jurisdictional uncertainty. 480 U.S. at 278-281.

III. THE DECISION BELOW CONFLICTS WITH THE DECISION OF THIS COURT THAT JURISDICTIONAL DEFECTS MAY BE CURED ON APPEAL

The "defect" in subject matter jurisdiction which the court of appeals believed—correctly or not—it discerned could easily have been remedied by dropping FMPO as a party. Indeed, by the time of the *sua sponte* jurisdictional ruling below FMPO no longer existed. On March 30, 1990, FMPO was merged into petitioner Freeport-McMoRan Oil & Gas Company ("FMOG"), and FMOG, a Delaware corporation, is diverse to K N.

Immediately after the opinion below was issued, petitioners filed a motion and affidavits calling these facts to the attention of the court⁸ and requesting the court to drop FMPO as a party, to substitute FMOG. This motion rested upon the authority of *Newman-Green Inc. v. Alfonzo-Larrain*, — U.S. —, 109 S.Ct. 2218 (1989).

On September 7, 1990, the court, without explanation, denied the motion as "moot." App. p. 11a.

Obviously, the motion was not, and could not have been, "moot." Granting it would have obviated any doubt that subject matter jurisdiction existed and permitted the court of appeals to decide the appeal on its merits.

The action of the court below in refusing even to consider the merits of the motion was either a failure to comprehend the effect of, or a refusal to abide by, the recent and squarely controlling decision of this Court in *Newman-Green*.

The decision below thus "ignored, consciously or unconsciously, the hierarchy of the federal court system." *Hutto v. Davis*, 454 U.S. 370, 375 (1982). *Newman-Green* "is the law, and the decision below cannot be recon-

⁸ Since the jurisdictional issue upon which the dismissal was entered was raised and decided by the court below *sua sponte*, petitioners had no occasion to present these facts to the court at an earlier time.

ciled with it." *Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.*, 460 U.S. 533, 535 (1983).

To require a jurisdictional dismissal of this case, and thereby compel diverse FMOG to refile in the same federal district court the same complaint which its predecessor in interest filed more than five years ago "would impose unnecessary and wasteful burdens on the parties, judges, and other litigants waiting for judicial attention." *Newman-Green*, — U.S. at —, 109 S.Ct. at 2225. If *Newman-Green* can be ignored on the facts of this case, it is a dead letter.

CONCLUSION

A writ of certiorari should be granted to review the judgment and opinion below.

Respectfully submitted,

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October, 1990

APPENDIX

APPENDIX

**UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

Nos. 89-1068, 89-1098

McMoRAN OIL AND GAS COMPANY, a Delaware corporation;
FREEPORT-McMoRAN, INC., a Delaware corporation;
and **FMP OPERATING COMPANY**, a Texas Limited Partnership,

Plaintiffs-Appellees/Cross-Appellants,

v.

KN ENERGY, INC., a Kansas corporation,
Defendant-Appellant/Cross-Appellee.

Appeal from the United States District Court
For the District of Colorado

D.C. No. 85-A-1081

[Filed Jul. 10, 1990]

Tucker K. Trautman (Lawrence P. Terrell and D. Monte Pascoe with him on the briefs) of Ireland, Stapleton, Pryor & Pascoe, P.C., Denver, CO, for Plaintiffs-Appellees/Cross-Appellants.

Robert L. Morris of Morris, Lower & Sattler (P. Kathleen Lower of Morris, Lower & Sattler; and Steve H. Ozawa of KN Energy, Inc., Lakewood, CO, with him on the briefs), Denver, CO, for Defendant-Appellant/Cross-Appellee.

Before **MOORE** and **McWILLIAMS**, Circuit Judges, and **BRATTON**, District Judge.*

* The Honorable Howard C. Bratton, Senior Judge, United States District Court for the District of New Mexico, sitting by designation.

MOORE, Circuit Judge.

Had the Supreme Court recently not decided to “adhere to our oft-repeated rule that diversity jurisdiction in a suit by or against the entity depends on the citizenship of ‘all the members,’” *Carden v. Arkoma Assocs.*, — U.S. —, 110 S. Ct. 1015, 1021 (1990) (citation omitted), this case might well have continued on its journey in federal court, successfully slipping past Scyllaea. Instead, snared on her rocky shore like the misfortunate seafarer, the action is wrest from our jurisdiction and must be dismissed.

I.

This odyssey began in 1985 when McMoRan Oil & Gas Company, a Delaware corporation with its principal place of business in Louisiana, and its parent company, Freeport-McMoRan Inc., a Delaware corporation with its principal place of business in New York, (McMoRan, collectively), filed suit in federal court in the district of Colorado, against KN Energy, Inc., a Kansas corporation with its principal place of business in Colorado. McMoRan alleged jurisdiction under 28 U.S.C. § 1332 (a) (1). In its suit, McMoRan, an oil and gas production company which sold gas to KN, complained that KN breached the parties’ gas purchase contract by failing to pay the renegotiated price provided in the contract. After two years of discovery, trial to the court was set to begin in July 1987.

Shortly before trial, McMoRan sought leave to file a second amended complaint. It became necessary for the court to reschedule the July trial to March 1988, however, without ruling on that motion. In December 1987, McMoRan again moved for permission to file a revised second amended complaint under Fed. R. Civ. P. 15 and 25(c), asserting that additional discovery, a recently decided Tenth Circuit case, and its assignment of the contract to FMP Operating Company, a Texas limited

partnership, necessitated the proposed amendment. The court granted the motion, and McMoRan filed a revised amended complaint in January 1988.

Trial to the court was scheduled finally for November 1988, after three previously set dates were vacated.¹ Three weeks before the November trial, however, KN moved to dismiss the action for lack of subject matter jurisdiction because of the addition of a nondiverse limited partner of FMP Operating Company, Freeport-McMoRan Energy Partners, which was comprised of Colorado and Kansas limited partners.² At a subsequent hearing, the court denied the motion, noting that with trial just two weeks off, “at a late point like this, there is sufficient ancillary jurisdiction that the court should proceed.” After a two-day trial, the court entered judgment in favor of McMoRan and FMP Operating and awarded \$1,602,712.51, based on its interpretation of the contract language “highest price then being paid” but limited monthly escalations to the express language of the contract. McMoRan and KN appealed, raising a variety of issues, all of which are now marooned by the failure of jurisdiction.

II.

Although recognizing our responsibility to oversee limitations on federal jurisdiction, *Koerpel v. Heckler*, 797 F.2d 858, 861 (10th Cir. 1986), McMoRan asseverates that obligation is fully met by looking only to the date on which the initial complaint is filed. If complete diversity exists on that date, subsequent changes like “the

¹ Each rescheduling was necessitated by the district court’s busy trial docket.

² To its motion KN attached a motion to dismiss previously filed before another judge in the same district. In that case, FMP Operating, the defendant, successfully moved to dismiss the action for lack of subject matter jurisdiction on the ground that some of its limited partners were citizens of Colorado and Kansas, making the partnership nondiverse from KN, the plaintiff.

mere addition" of a party plaintiff will not deprive the court of jurisdiction unless the additional plaintiff was an indispensable party when the complaint was filed. See, e.g., *American Nat. Bank & Trust Co. of Chicago v. Bailey*, 750 F.2d 577, 582-83 (7th Cir. 1984), cert. denied, 471 U.S. 1100 (1985). McMoRan maintains that since FMP Operating was not an indispensable party at the outset of the action, the subsequent contract assignment compelling its addition as a party plaintiff does not disturb the initial attachment of diversity jurisdiction. Indeed, because the nature of the action and the right asserted remained the same, McMoRan urges, the court's jurisdiction "should not be re-examined as of a later date." Finally, McMoRan notes in its brief, as general partners,³ "both McMoRan and FMI, with their general partner responsibilities and authority and significant financial stake in FMPO, continued to have a real interest in the outcome of this litigation."

Before we consider the particular issues of this case, we revisit the principles of 28 U.S.C. § 1332(a)(1) which confers federal jurisdiction "where the matter in controversy exceeds the sum or value of \$50,000 exclusive of interests and costs, and is between citizens of different States." The statute requires complete diversity of citizenship; that is, no plaintiff can be a citizen of the same state as any defendant. "Whatever may have been the original purposes of diversity-of-citizenship jurisdiction, this subsequent history [the re-enacted or amended statute] clearly demonstrates a congressional mandate that diversity jurisdiction is not to be available when any plaintiff is a citizen of the same State as any defendant." *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365, 373-74 (1978) (citation omitted).

While the courts and Congress previously have decided how most artificial entities created by state law will be

³ McMoRan is the managing general partner, and Freeport-McMoRan is the special general partner of FMP Operating.

treated for purposes of federal diversity jurisdiction, the citizenship of a limited partnership has only recently been resolved. For purposes of determining whether diversity jurisdiction is present, the Court has held during the present term that the citizenship of all of the members of the entity must be consulted. *Carden*, 110 S. Ct. at 1021. Thus, if a limited partner is a citizen of the same state as a party on the other side of the action, diversity jurisdiction is unavailable to try an otherwise non-federal claim.

Regardless of how the parties may characterize their presence or the action, "[s]ince diversity of citizenship is a jurisdictional requirement, the Court is always 'called upon to decide' it." *Id.* at 1021 (quoting *Great Southern Fire Proof Hotel Co. v. Jones*, 177 U.S. 449 (1900)). No action by the parties, by waiver, consent, or stipulation, can intrude on the court's duty to assure its power to render judgment. As courts of limited jurisdiction, we must always be aware that this power emanates solely from the Constitution and Congress and "must be neither disregarded nor evaded." *Owen Equipment*, 437 U.S. at 374.

Hence, although complete diversity was present when the complaint was filed, our inquiry now focuses on whether the addition of a party plaintiff, denominated a substitution under Fed. R. Civ. P. 25(c), destroys the court's subject matter jurisdiction. At the outset, we recognize that when the matter was resolved by the district court, the circuits were divided over how to determine the citizenship of a limited partnership; the action had undergone three years of discovery; and the district court had already devoted considerable time prodding the case toward trial.⁴ None of these considerations, however, can

⁴ For example, one of the issues on appeal is the court's refusal to permit KN to add witnesses and exhibits shortly before the November trial. The court denied the motion on the grounds that additional time would then be necessary for plaintiffs to respond and a continuance might be necessary.

become the basis for asserting jurisdiction if, in fact, it is destroyed.

In its revised amendment, McMoRan asked the district court to join FMP Operating as a plaintiff under Fed. R. Civ. P. 25(c), which states:

Transfer of Interest. In case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party. Service of the motion shall be made as provided in subdivision (a) of this rule.

"Subdivision (c) of Rule 25 deals with transfers of interest during the course of the action." 3B J. Moore & J. Kennedy, *Moore's Federal Practice* § 25.08, at 25-77 to 25-78 (1987). It presupposes that the *substituted* person was a party to the pending action but no longer maintains the same interest in the outcome as the substituting party. Because Rule 25(c) is procedural, if diversity jurisdiction was established at the time the complaint was filed, the substitution of a nondiverse party to carry on the lawsuit will not affect the court's jurisdiction. Underlying the rule is the desire to preserve the adjudication for the real party in interest in the matter.⁵

However, in this case, FMP Operating was not substituted for McMoRan. The district court made no findings under rule 25(c) either to accept the substitution or to permit, in its discretion, the transferor, McMoRan, to continue in the action. Indeed, McMoRan remained in the litigation as an active participant and prosecutes this appeal. Although McMoRan transferred or assigned its interest in the subject contract to FMP Operating, its continuing presence in the action undermines its argument

⁵ In contrast, when a transfer of interests occurs prior to the institution of an action, Fed. R. Civ. P. 17 provides that the action shall be prosecuted in the name of the real party in interest.

that the policy underlying Fed. R. Civ. P. 25(c) can be called upon to maintain the court's diversity jurisdiction.

Instead, FMP Operating was *added* as a party plaintiff. McMoRan transferred its interest in the lawsuit because FMP Operating was the real party in interest to the outcome of the litigation. The pretrial order framing the parties, issues, and relief states that FMP Operating succeeded to the producing properties and gas purchase contract upon which the lawsuit was based. The relief requested was damages for breach of that contract and a declaration of the means to determine the price to be paid for the gas sold under the contract. Given these facts, *Carden* establishes that FMP Operating's addition as the real party in interest destroys the district court's diversity jurisdiction.

Moreover, McMoRan cannot be rescued by the doctrine of ancillary jurisdiction on which the district court relied to proceed with the action. Although the district court believed the additional party plaintiff's presence could be moored to this concept and the original action heard, the court's conclusion was in error. The jurisdiction the district court exercised over FMP Operating was not an incident to the principal action; it was the principal action. As the Court has clarified,

ancillary jurisdiction typically involves claims by a defending party haled into court against his will, or by another person whose rights might be irretrievably lost unless he could assert them in an ongoing action in a federal court. A plaintiff cannot complain if ancillary jurisdiction does not encompass all of his possible claims . . . since it is he who has chosen the federal rather than the state forum and must thus accept its limitations.

Owen Equipment, 437 U.S. at 376. Although the court's exercise of ancillary jurisdiction is within its discretion, "we should be cautious about using elastic and ill-defined

notions of ancillary jurisdiction—a concept not mentioned in Article III—to expand our jurisdiction.” *American Nat. Bank & Trust Co.*, 750 F.2d at 581. Because McMoRan chose the federal forum to decide its state law claim, it must be bound by its limitations.

Although considerations of efficiency and judicial economy often inject some flexibility into the otherwise rigid bounds of the rule of complete diversity, these concerns do not alone control. Based on the record before us, FMP Operating failed to establish that it possessed the requisite citizenship to permit the court to proceed to hear the matter. The district court erred in permitting McMoRan to amend the complaint to add a nondiverse plaintiff on the ground that its ancillary jurisdiction could overcome this essential defect. The judgment is therefore REVERSED with directions to dismiss the complaint for lack of jurisdiction over the subject matter.

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Nos. 89-1068
89-1098

McMoRAN OIL AND GAS COMPANY, ETC., *et al.*,
Plaintiffs-Appellees,
Cross-Appellants,
v.

KN ENERGY, INC.,
Defendant-Appellant.
Cross-Appellee.

ORDER

Filed August 30, 1990

Before HOLLOWAY, Chief Judge, McWILLIAMS, McKAY, LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY and EBEL, Circuit Judges, and BRATTON,* District Judge.

The court has for consideration plaintiffs' petition for rehearing and suggestion for rehearing en banc, defendant's response, and plaintiffs' motion for leave to file a reply.

Plaintiffs' motion for leave to file a reply is denied. Further, rehearing is denied by the panel.

* Honorable Howard C. Bratton, Senior Judge, United States District Court for the District of New Mexico, sitting by designation.

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In accordance with Fed. R. App.P. 35(b), the clerk transmitted the suggestion for rehearing en banc to the members of the panel and the judges of the court who are in regular active service. No vote was requested and, therefore, rehearing en banc is denied.

Entered for the Court

/s/ Robert L. Hoecker
ROBERT L. HOECKER
Clerk

11a

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 89-1068
89-1098

McMoRAN OIL AND GAS COMPANY, a Delaware corporation;
FREEPORT-McMoRAN INC., a Delaware corporation;
and FMP OPERATING COMPANY, a Texas Limited Partnership,

Plaintiffs-Appellees,

v.

KN ENERGY, INC.,
Defendant-Appellant.

ORDER

Filed September 7, 1990

Before MOORE, McWILLIAMS, Circuit Judges, and
BRATTON, District Judge.*

This matter comes on for consideration of appellee's motion for stay of mandate pending application for certiorari and request for clarification of status of pending motion to dismiss nondiverse party.

Upon consideration whereof, appellee's motion for stay of mandate is granted through October 9, 1990, and that if on or before that date there is filed with the Clerk of

* Honorable Howard C. Bratton, Senior Judge, United States District Court for the District of New Mexico, sitting by designation.

this Court a notice from the Clerk of the Supreme Court that appellees have filed a timely petition for writ of certiorari in that Court, the stay shall continue until final disposition in the Supreme Court.

It is further ordered that appellee's motion to dismiss nondiverse party is denied as moot.

Entered for the Court

/s/ Robert L. Hoecker
ROBERT L. HOECKER
Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 85-Z-1081

MCMORAN OIL AND GAS COMPANY, a Delaware corporation;
FREEPORT-MCMORAN INC., a Delaware corporation;
and FMP OPERATING COMPANY, a Texas Limited Partnership,

Plaintiffs,

v.

KN ENERGY, a Kansas corporation,
Defendant.

ORDER AND JUDGMENT

[Filed Dec. 28, 1988]

This diversity case was tried from November 17 through November 18, 1988, before the Honorable Zita L. Weinshienk, Judge. The issue was the price of natural gas on and after January 1, 1985, under a "take or pay" contract between plaintiffs and defendant. The trial proceeded to conclusion and the Court made oral findings of fact and conclusions of law which are incorporated herein by reference, as if fully set forth. In addition, the parties filed a Stipulation As To Damages on December 2, 1988. Accordingly, it is

DECLARED AND ADJUDGED that the price of gas under the contract is \$4.166 per million British thermal units (MMBtu's), subject to a yearly increase of \$.01 per MMBtu's. It is

ORDERED that judgment is entered in favor of plaintiffs McMoran Oil and Gas company, Freeport-McMoran, Inc., and FMP Operating Company, and against defendant K N Energy, Inc., in the amount of \$1,602,712.51 plus costs. It is

FURTHER ORDERED that that this judgment shall accrue interest at the rate of 9.20% per annum from the date of this judgment. It is

FURTHER ORDERED that plaintiffs shall have their costs upon the filing of a Bill of Costs with the Clerk of the Court within ten (10) days from entry of this Order and Judgment.

DATED at Denver, Colorado, this 28th day of December, 1988.

BY THE COURT:

/s/ Zita L. Weinshienk
ZITA L. WEINSHIENK
Judge
United States District Court

December 28, 1988

Civil Action No. 85-Z-1081

CERTIFICATE OF MAILING

The undersigned hereby certifies that on the above date copies of ORDER AND JUDGMENT entered by Judge Zita L. Weinshienk and filed on December 28, 1988, were mailed to the following:

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By /s/ P. J. ALLEN
Deputy Clerk